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BANK PEMBANGUNAN MALAYSIA BHD v. SIDQI AHMAD SAID AHMAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[SUIT NO: WA-22NCC-264-06-2022]
10 DECEMBER 2024

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Abstract – *Civil bribery claims operate differently of criminal proceedings, with distinct remedies and different standard of proof. Therefore, in this case, although the Malaysian Anti-Corruption Commission had concluded their investigations against the second defendant, who was a party involved in allegations of, among others, bribery concerning a loan granted by a development financial institution ('DFI') with 'No Further Action', the DFI was allowed to proceed with their civil suit against, among others, the second defendant, based on similar allegations.*

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CIVIL PROCEDURE: *Disposal on point of law – Issues – Development financial institution ('DFI') granted loan to company for development of project – DFI commenced suit to claim for RM564,991,617.25 against involved parties involving allegations of bribery – First defendant originally named in suit passed away prior to commencement of full trial – Malaysian Anti-Corruption Commission concluded with 'No Further Action' against second defendant – Whether DFI had elected between two remedies – Whether matters pleaded gave rise to Quistclose trust – Whether preliminary issues raised suitable for determination under O. 33 of Rules of Court 2012*

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The plaintiff was a development financial institution, while the defendants were the individuals and companies involved in a loan granted by the plaintiff. To develop a coastal network consisting of installing a fibre optic network around Peninsular Malaysia, the plaintiff had entered into a loan agreement and granted Aries Telecoms (M) Bhd ('Aries') a loan facility amounting to RM400,000,000 to partly finance the said project. The said loan was disbursed in two tranches. Due to allegations that the defendants had committed, among others, bribery, fraud and misuse of the loan funds ('allegations'), the plaintiff had obtained judgment against Aries in this court ('Suit 313'). Following Suit 313, a winding-up notice was issued against Aries. Subsequently, the plaintiff filed the instant suit against the defendants, seeking for RM564,991,617.25 based on the same allegations ('instant suit'). Before the instant suit could proceed to a full trial, the first defendant originally named in the instant suit, passed away. The Malaysian Anti-Corruption Commission ('MACC'), who had conducted investigations in respect of the allegations concerning the loan, had concluded with 'No

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Further Action' against the second defendant. All enforcement actions against the second respondent's assets and bank accounts were uplifted ('development'). Hence, the present application by the second defendant, for the determination of preliminary issues, before the instant suit went for full trial, pursuant to O. 33 rr. 2, 3(2) or 5 and/or O. 92 r. 4 of the Rules of Court 2012 ('ROC') ('encl. 449'). In encl. 449, the second defendant raised the following questions of law, *inter alia*: (i) whether the civil courts had the jurisdiction to determine or declare that a criminal wrong, the offence of bribery, had been committed. If the answer was affirmative, whether the plaintiff's pleaded causes of action or allegations against the second defendant were unsustainable and ought to be set aside considering the development, which among others, would cause the evidence from the first defendant to remain untested; (ii) whether the plaintiff's causes of action against the second defendant were unsustainable and ought to be struck out considering that the plaintiff had elected to pursue all their rights under the loan agreement and had obtained the judgment in Suit 313; (iii) whether the matters pleaded by the plaintiff in their amended statement of claim could give rise to a Quistclose trust; (iv) whether co-mingling of funds into Aries' banking account including the receipt of the loan sum under the loan agreement, could give rise to a Quistclose trust; (v) whether the Quistclose trust as pleaded by the plaintiff was unsustainable and ought to be struck out given that was only limited to the monies advanced unless explicitly agreed by the relevant parties; and (vi) whether the plaintiff was entitled to trace and establish ownership over the sum of RM564,991,617.25 considering that there was a co-mingling of the loan sum disbursed by the plaintiff to Aries.

Held (dismissing encl. 449):

(1) The second defendant had fundamentally mischaracterised the nature of the plaintiff's claim. The plaintiff had not sought criminal sanctions or a declaration of criminal guilt but was pursuing civil remedies including the recovery of alleged bribe monies, which was a proprietary claim governed by civil law principles. The principle, as enunciated by *Petrotrade Inc & Ors v. Smith & Ors*, which was equally applicable to our jurisdiction, was that civil bribery claims operated independently of criminal proceedings, with distinct remedies and a different standard of proof. Other than that, the fact that MACC had issued a 'No Further Action' notice did not preclude the plaintiff from pursuing civil remedies. Similarly, while the previous first defendant's passing was unfortunate, it did not render the civil proceedings untenable. The plaintiff would still have to prove its claims through documentary evidence and testimony of other witnesses, subject to the normal rules of evidence and procedure. Hence, the court did possess the jurisdiction to hear and determine the plaintiff's civil claims based on allegations of bribery. The questions posed by the second defendant was not suitable

for determination under O. 33 of the ROC, because they had proceeded on an incorrect premise about the nature and scope of civil jurisdiction. (paras 35-39)

(2) In *OCBC Bank (Malaysia) Bhd v. Yong Hong Development Sdn Bhd & Ors* ('*OCBC Bank*'), it was held that the doctrine of election in Malaysia did not restrict two legal actions if they were from two separate causes of action, even if the facts were similar. Suit 313 was premised on the loan agreement, while the current proceedings involved, among others, allegations of bribery which the plaintiff only discovered from 2020 onwards. The loan was disbursed to Aries in two tranches, respectively, on 2 July 2012 and 15 November 2013, but the alleged bribery scheme was only discovered around January 2022. The timing of these discoveries was crucial. The plaintiff could not have made an election between two remedies when it was unaware of the fraud at the time of pursuing its recovery action. As such, the question posed by the second defendant was not suitable for determination under O. 33 of the ROC. (paras 42-45)

(3) The questions concerning the existence of a Quistclose trust and related tracing claims were not suitable for determination under O. 33 of the ROC. Firstly, the existence of the trust fundamentally depends on the parties' mutual intention, which would require examination of their relationships and conduct. The loan was disbursed in two tranches. Whether these funds were advanced with the requisite intention to create a trust relationship was a matter that required detailed examination of evidence at trial. Secondly, the court in *R v. Clowes & Anor (No 2)* viewed that segregation of assets was not a necessary element to establish a Quistclose trust. The fact that a transaction contemplated mingling of funds was not necessarily fatal to a trust. Thirdly, the tracing claims raised by the plaintiff involved complex factual issues regarding the flow of funds through various accounts and entities. The plaintiff's attempt to trace would require careful examination of documentary evidence and potentially witness testimony to establish the path of these funds. The determination of this question, summarily under O. 33, would not result in savings of time and costs, but rather, it would risk fragmenting the trial and potentially leading to duplicate proceedings if appeals were to arise from preliminary determinations. It would be more appropriate if these questions be resolved in a full trial where all relevant evidence could be properly tested and examined. (paras 48 & 50-54)

Case(s) referred to:

AIA Bhd v. Dr Tan Siew Hui [2020] CLJU 258; [2020] 1 LNS 258 HC ***(refd)***

Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567 ***(refd)***

Hiap Soon Hong Sdn Bhd v. Leopad Assets Sdn Bhd [2018] CLJU 664; [2018] 1 LNS 664 CA ***(refd)***

Jagdis Singh Banta Singh v. Zakaria Yahaya & Anor [2018] CLJU 1151; [2018] 1 LNS 1151 CA ***(refd)***
Messrs KK Lim & Associates v. OCBC Bank (Malaysia) Bhd (Civil Appeal No: J-02(IM)(NCVC)-756-04-2021) (Unreported) ***(dist)***
OCBC Bank (Malaysia) Bhd v. Yong Hong Development Sdn Bhd & Ors [2020] CLJU 1164; [2020] 1 LNS 1164 HC ***(refd)***
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(foll)***
Petrotrade Inc & Ors v. Smith & Ors [2000] All ER (D) 264 ***(refd)***
R v. Clowes & Anor (No 2) [1994] 2 All ER 316 ***(refd)***
SI Rajah & Anor v. Dato' Mak Hon Kam & Ors (No 1) [1994] 1 CLJ 207 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 33 rr. 2, 3(2), 5, O. 92 r. 4

For the plaintiff - Lim Chee Wee, Nathalie Ker Si Min, Pang Huey Lynn, Charmaine Choong & Saradha Lakshmi; M/s Lim Chee Wee Partnership
For the 2nd defendant - James Ding Tse Wan; M/s CH Tay & Partners

Reported by Syamim Ariffin

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] This judgment concerns a civil suit arising from an allegedly fraudulent scheme involving a loan facility of RM400 million granted by a development financial institution for a nationwide telecommunications infrastructure project. The central allegations include bribery of a senior officer of the financial institution, manipulation of loan conditions and approval processes, misappropriation of loan funds through various corporate vehicles, and breach of fiduciary duties by several parties involved in the project. A key preliminary issue is whether the civil courts have jurisdiction to make findings on matters that potentially constitute criminal conduct, particularly where criminal investigations have concluded with no further action. The case also raises significant questions about the doctrine of election where the plaintiff has already obtained judgment against the principal borrower in earlier proceedings, and the application of *Quistclose* Trust principles to trace and recover allegedly misappropriated funds. These preliminary issues are brought before the court through an application under O. 33 of the Rules of Court 2012 for the determination of questions of law before the main trial.

Background Facts

[2] On 23 May 2012, Bank Pembangunan Malaysia Berhad ("the plaintiff") entered into a facilities agreement ("loan agreement") with Aries Telecoms (M) Berhad ("Aries") to provide a loan of RM400,000,000 to partly finance the development of a coastal network consisting of installing

a fibre optic network around Peninsular Malaysia ("the project"). The loan was disbursed in two tranches – RM200,000,000 on 2 July 2012 and RM200,000,000 on 15 November 2013.

[3] The plaintiff had previously obtained judgment against Aries in Kuala Lumpur High Court Suit No. WA-22NCC-313-07-2018 ("Suit 313") on 9 May 2019. Following this, the plaintiff issued a winding-up notice against Aries on 13 July 2022. Aries' appeal to the Court of Appeal against the summary judgment in Suit 313 was dismissed on 25 November 2021. Aries' subsequent application for leave to appeal to the Federal Court was dismissed on 25 April 2022.

[4] The plaintiff's claim in this instant Suit WA-22NCC-264-06-2022 is for RM564,991,617.25 against 30 defendants based on allegations of bribery, fraud, conspiracy to defraud, breach of directors' duties, fraudulent breach of trust, negligence, dishonest assistance, knowing receipt and monies had and received. The plaintiff alleges that the defendants were involved in a fraudulent scheme involving misrepresentation of Aries' financials, improper waiver of loan conditions, manipulation of the appointment process for the Independent Checking Engineer, unauthorised replacement of the turnkey contractor, and siphoning of funds from Aries to various related companies.

[5] Mohd Zafer Mohd Hashim ("Dato' Zafer"), who was initially named as the first defendant in this suit and was the President and Group Managing Director of the plaintiff at the material time, passed away on 20 July 2022. The estate of Dato' Zafer is now represented by two joint administrators: Izlin binti Ismail (the 28th defendant) and Muhammad Radzi bin Mohd Zafer (the 29th defendant).

[6] The corporate defendants in this case include Paneagle Holdings Berhad (the 15th defendant), Paneagle Sdn Bhd (the 16th defendant), VCB Investment Berhad (the 17th defendant), Open Fibre Sdn Bhd (the 18th defendant), Primawin Limited (the 19th defendant), China Finance Limited (the 20th defendant), Hadron Equities Limited (the 21st defendant), Orient Telecoms Sdn Bhd (the 22nd defendant), Silver Ridge Holdings Bhd (the 23rd defendant), BVS Trinity Sdn Bhd (the 24th defendant), VCB Malaysia Bhd. (the 25th defendant), Zavarco PLC (the 26th defendant), and Silver Ridge Sdn Bhd (the 27th defendant).

[7] The individual defendants are: Sidqi Ahmad Said bin Ahmad (the first defendant), Shailen a/l Popatlal (the second defendant), Wan Alias bin Wan Ngah (the third defendant), Roslina binti Ibrahim (the fourth defendant), Abdul Wahid bin Abdul Ghani (the fifth defendant), Mohd Radzi bin Mohamed (the sixth defendant), Muhammad Shazhakim bin Shazarul Hisham (the seventh defendant), Shazaarina binti Shazarul Hisham (the eighth defendant), Mustafa Ali Zamin Ali Sayed (the ninth defendant), Wong Chee Keong (the tenth defendant), Abd Hadi bin Abd Majid (the 11th

defendant), Tunku Mazlina binti Tunku Abd Aziz (the 12th defendant), Ranjeet Singh Sidhu (the 13th defendant) ("Ranjeet"), Noorus A'adah binti Othman (the 14th defendant) ("Adah"), and Zakaria bin Saad (the 30th defendant).

[8] The total sum claimed by the plaintiff is RM564,991,617.25, comprising principal sum of RM386,870,939.07, interest of RM50,493,919.50, late payment interest of RM126,623,721.12, and charges of RM1,003,037.56.

[9] The Malaysian Anti-Corruption Commission ("MACC") conducted investigations in relation to certain allegations concerning the loan transactions. The MACC subsequently concluded with "no further action" against the second defendant and lifted all enforcement actions against his assets and bank accounts.

[10] The second defendant filed this present application under O. 33 rr. 2, 3(2) or 5 and/or O. 92 r. 4 of the Rules of Court 2012 on 25 July 2024 for the determination of preliminary questions of law.

Enclosure 449

[11] This is an application by the second defendant pursuant to O. 33 rr. 2, 3(2) or 5 and/or O. 92 r. 4 of the Rules of Court 2012 for the determination of preliminary questions of law before full trial. The application seeks to have several legal questions determined which could potentially dispose of the proceedings or substantially narrow down the issues for trial. The application relates to a suit where the plaintiff is claiming RM564,991,617.25 against multiple defendants based on alleged bribery and misuse of loan funds.

[12] The questions presented for determination as they appear in encl. 449 are:

1. Whether the civil courts have jurisdiction to determine or declare that a criminal wrong, in this case the offence of bribery, has been committed?

   (i) if the answer is 'No', whether the Plaintiff's pleaded causes of action or allegations against the 2nd Defendant are unsustainable or ought to be struck out?

   (ii) if the answer is 'Yes', whether the Plaintiff's pleaded causes of action or allegations against the 2nd Defendant are unsustainable or ought to be struck out, given that -

      (a) Mohd Zafer Mohd Hashim, the previous 1st Defendant ["Dato' Zafer"], has passed away and no evidence on his part could be given at trial; or

      (b) the Malaysian Anti-Corruption Commission ["MACC"] has concluded that there is "No Further Action" on the bribery allegations against inter alia the 2nd Defendant?

2. Whether the Plaintiff's cause(s) of action here is unsustainable or ought to be struck out given that:-

(i) the Plaintiff had elected to pursue all their rights under the Facilities Agreement dated 28.6.2012 ["Loan Agreement"] entered into with Aries Telecoms (M) Berhad ["Aries"] and obtained judgment on 9.5.2019 through the Kuala Lumpur High Court Suit No. WA-22NCC-313-07/2018 ["Judgment"];

(ii) here, the Plaintiff is pursuing other or a separate cause of action of misrepresentation arising from the matters or issues in the Loan Agreement's transactions.

3. Whether the matters pleaded by the Plaintiff in the amended statement of claim [Encl. 240] could give rise to a Quistclose Trust at law.

4. Whether the co-mingling of funds into Aries' banking account including the receipt of the loan sum under the Loan Agreement, having no separation with any other funds in the said banking account, could give rise to a Quistclose Trust at law.

5. Whether a Quistclose Trust as pleaded by the Plaintiff in the amended statement of claim [Encl. 240] is unsustainable and ought to be struck out given that is limited to the monies advanced unless explicitly agreed between the relevant parties.

6. Whether the Plaintiff is entitled (*ie*, has the *locus standi*) to trace and establish ownership of RM564,991,617.25 against the 2nd Defendant as pleaded when there is a co-mingling of the loan sum disbursed by the Plaintiff to Aries, in Aries' funds.

[13] The grounds for the application, as stated in the second defendant's affidavit, are that the determination of these questions would resolve the issues concerning the second defendant in a just, expeditious and economical manner, and at minimum, would substantially narrow down and determine the actual issues in the proceeding. The questions rely on undisputed facts or objective facts, making them suitable for determination at this stage. Particularly regarding the bribery allegations, the application is supported by significant factual developments: Dato' Zafer (the alleged recipient) has passed away and thus cannot provide evidence at trial, and MACC has concluded "no further action" against the second defendant and lifted all enforcement actions against his assets and bank accounts. The second defendant argues these factors make the legal determinations crucial before proceeding to a full trial. Furthermore, considering that the plaintiff has already obtained judgment in another suit and is now pursuing separate causes of action arising from the same subject matter, these questions warrant preliminary determination. The application would promote judicial efficiency by potentially resolving key legal issues without the need for a full trial on all matters, especially given that the central premise of the plaintiff's claim rests on allegations of bribery which the second defendant contends should be determined as a preliminary matter of law.

Submissions Of The Second Defendant

[14] The second defendant submits that there are six key questions that should be determined under O. 33 of the Rules of Court 2012. These questions would be decisive in determining the suit and lead to substantial savings in time and costs.

[15] According to the second defendant's position, the alleged bribery claim by the plaintiff is the central pillar that underpins all other causes of action. The second defendant contends that since Dato' Zafer has passed away and the MACC has issued a "no further action" notice regarding the bribery allegations, the civil court lacks jurisdiction to determine matters concerning criminal wrongdoings like bribery.

[16] In relation to the doctrine of election, the second defendant argues that the plaintiff cannot, on one hand, affirm the loan agreement in Suit 313 to obtain judgment, while on the other hand assert in this proceeding that the same agreement was procured through misrepresentation and fraud.

[17] The second defendant further maintains that no *Quistclose* Trust could arise in this case as there was no segregation of the loan funds from Aries' general assets. The second defendant emphasises that segregation of funds is a fundamental requirement for establishing a *Quistclose* trust.

[18] On the issue of co-mingling of funds, the second defendant asserts that once the loan funds were co-mingled with Aries' other funds, any trust that may have existed would be destroyed. This would make it impossible for the plaintiff to trace or establish ownership over any specific funds.

[19] The second defendant concludes by highlighting that the plaintiff's claim seeking to trace RM564,991,617.25 is untenable when the total loan disbursed was only RM400,000,000 and Aries' total revenue during the relevant period was RM644,580,829, demonstrating the co-mingling of funds. In the second defendant's view, these questions of law should be determined preliminarily as they would substantially dispose of the plaintiff's claims.

Submissions Of The Plaintiff

[20] The plaintiff submits that the six questions posed by the second defendant in encl. 449 are unsuitable for preliminary determination. The plaintiff emphasises that these questions form part of the broader fraud litigation where the issues are interrelated and should be properly ventilated at trial.

[21] Central to the plaintiff's position is the contention that the bribery allegations are not the foundation of its case, as claimed by the second defendant. Rather, the plaintiff maintains that its case centres on an overarching conspiracy to defraud the bank, with multiple major causes of action beyond just bribery.

[22] In addressing the argument regarding civil courts' jurisdiction over bribery claims, the plaintiff argues forcefully that its cause of action is based on civil bribery rather than criminal bribery. According to the plaintiff, the fact that MACC issued a "no further action" notice is irrelevant to its civil claim, which operates under different standards and seeks different remedies.

[23] The plaintiff challenges the second defendant's characterisation of the doctrine of election issue. From the plaintiff's perspective, it was impossible to have made an election between two remedies when it did not have knowledge of the fraud at the time of pursuing its recovery action in Suit 313.

[24] On the *Quistclose* Trust issue, the plaintiff strongly disputes the notion that segregation of funds is an essential requirement. The plaintiff argues that the existence of a *Quistclose* Trust depends on the parties' mutual intention, which is a question of fact that must be determined at trial.

[25] The plaintiff concludes by asserting that the co-mingling of funds does not automatically defeat its tracing claims. The plaintiff maintains that these complex issues involving fund tracing and establishing ownership require full exploration through evidence at trial, rather than summary determination through O. 33.

The Law On O. 33 Applications

[26] Order 33 r. 2 of the Rules of Court 2012 provides:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[27] Order 33 r. 3(2) further provides:

> In any such action, different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

[28] Rule 5 sets out the court's power following determination of a preliminary issue:

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[29] The application of these provisions involves a two-stage process, as explained by the High Court in *AIA Bhd v. Dr Tan Siew Hui* [2020] CLJU 258; [2020] 1 LNS 258; [2020] MLJU 351:

> [28] Even if the Sessions Court was of the opinion that the issue of liability could be decided as a preliminarily issue, it should have made an order to that effect and give directions for the hearing for the determination of the preliminary issue. That would be the first stage. Then only would the Sessions Court hear the issue proper in the manner directed and make a decision thereon. That would be the second stage.

[30] The key consideration in determining whether to allow an O. 33 application was set out by the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8, adopting the principle stated in *SI Rajah & Anor v. Dato' Mak Hon Kam & Ors* [1994] 1 CLJ 207; [1993] 3 MLJ 741:

> As a general rule, the court will exercise its power under Order 33 rule 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

[31] Additionally, the Court of Appeal in *Hiap Soon Hong Sdn Bhd v. Leopad Assets Sdn Bhd* [2018] CLJU 664; [2018] 1 LNS 664 emphasised that O. 33 applications require undisputed facts:

> [26] … in order for Order 33 to have any efficacy, it is necessary for the judge to ensure, at the outset, that the relevant facts are not disputed. This can be done by ordering the parties either to agree to the facts stated in the pleadings or to file an agreed statement of facts.

[32] These authorities establish that for an O. 33 application to succeed, the preliminary questions must be capable of substantially disposing of the action or achieving significant time and cost savings, and the relevant facts must not be in dispute between the parties.

Analysis And Findings Of The Court

Whether The Civil Court Has Jurisdiction To Determine Bribery Allegations

[33] The second defendant contends that this court, being a civil court, lacks jurisdiction to determine matters concerning criminal wrongdoings such as bribery. The second defendant argues that since Dato' Zafer has passed away and the MACC has issued a "no further action" notice regarding the bribery allegations, the plaintiff's pleaded causes of action are unsustainable and ought to be struck out. The second defendant further submits that Dato' Zafer's passing would render crucial evidence from him untested, thereby severely prejudicing the second defendant's right to a fair trial.

[34] The plaintiff, on the other hand, maintains that its present suit involves civil causes of action for bribery where it seeks civil remedies with the civil burden of proof applying. The plaintiff argues that even if there had been no charge by the MACC, this is irrelevant to the plaintiff's case, as it is premised on a civil cause of action of bribery based on the balance of

probabilities standard. The plaintiff relies on the English High Court decision in *Petrotrade Inc and others v. Smith and others* [2000] All ER (D) 264, where the court held that in the context of civil law, a bribe means the payment of a secret commission and that a claim based on bribery is a special form of fraud.

[35] Having carefully considered the submissions, I find that the second defendant's contention is misconceived. The question posed by the second defendant fundamentally mischaracterises the nature of the plaintiff's claim. The plaintiff does not seek criminal sanctions or a declaration of criminal guilt. Rather, as evident from the amended statement of claim (encl. 240), the plaintiff pursues civil remedies including the recovery of alleged bribe monies, which is a proprietary claim governed by civil law principles.

[36] The English High Court's analysis in *Petrotrade Inc* is particularly instructive. The court there recognised that civil bribery claims operate independently of criminal proceedings, with distinct remedies and a different standard of proof. This principle is equally applicable in our jurisdiction, where civil and criminal proceedings serve different purposes and operate under separate legal frameworks.

[37] The fact that the MACC has issued a "no further action" notice does not preclude the plaintiff from pursuing civil remedies. These are parallel but distinct legal avenues, each with its own burden and standard of proof. Similarly, Dato' Zafer's passing, while unfortunate, does not render the civil proceedings untenable. The plaintiff would still need to prove its claims through documentary evidence and testimony of other witnesses, subject to the normal rules of evidence and procedure.

[38] Furthermore, the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 has clearly established that in civil cases, including those involving allegations of fraud, the standard of proof is on the balance of probabilities. The criminal aspect of the allegation and the standard of proof required thereof should be irrelevant in the deliberation.

[39] Accordingly, I find that this court has jurisdiction to hear and determine the plaintiff's civil claims based on allegations of bribery. The questions posed by the second defendant in this regard are not suitable for determination under O. 33 as they proceed on an incorrect premise about the nature and scope of civil jurisdiction.

Whether The Doctrine Of Election Bars The Plaintiff's Claims

[40] The second defendant submits that the plaintiff's cause of action in this suit is unsustainable as the plaintiff had previously elected to pursue their rights under the loan agreement entered into with Aries and obtained judgment on 9 May 2019 through Suit 313. The second defendant contends

that the plaintiff cannot now pursue a separate cause of action of misrepresentation arising from matters or issues in the loan agreement's transactions.

[41] The plaintiff argues that its causes of action in the present suit and Suit 313 are separate and distinct. The plaintiff maintains that it did not have knowledge of the fraud at the time of filing its recovery action in 2018, only discovering these facts through subsequent investigations in 2020 and through evidence from Ranjeet and Adah in 2022. The plaintiff relies on the High Court decision in *OCBC Bank (Malaysia) Bhd v. Yong Hong Development Sdn Bhd & Ors* [2020] CLJU 1164; [2020] 1 LNS 1164; [2020] MLJU 847, where on similar facts, the court held that since the causes of action were distinct and separate, and independent of each other, the doctrine of merger did not operate as an estoppel against the fraud suit.

[42] Having considered the submissions, I find that the doctrine of election does not operate to bar the plaintiff's claims in this suit. The facts in *OCBC Bank* are particularly instructive. In that case, as here, the plaintiff bank had earlier obtained summary judgment against borrowers for recovery of loan monies, and then brought a fraud suit against the same defendants and others. The High Court held that the doctrine of election in Malaysia does not restrict two legal actions simultaneously if they are from two separate causes of action, even if the facts may be the same.

[43] In the present case, Suit 313 was premised on a straightforward recovery action based on the loan agreement, while the current proceedings involve allegations of fraud, conspiracy, and bribery that the plaintiff only discovered from 2020 onwards. The loan disbursed by the plaintiff to Aries was in two tranches of RM200,000,000 each on 2 July 2012 and 15 November 2013 respectively, but the alleged bribery scheme was only discovered through Ranjeet in or around January 2022.

[44] The timing of these discoveries is crucial. The plaintiff could not have made an election between two remedies when it was unaware of the fraud at the time of pursuing its recovery action. This distinguishes the present case from the Court of Appeal's decision in *Messrs KK Lim & Associates v. OCBC Bank (Malaysia) Bhd* (Civil Appeal No: J-02(IM)(NCVC)-756-04-2021), where the plaintiff bank was aware of potential fraud before commencing its recovery action.

[45] Accordingly, I find that this question is not suitable for determination under O. 33. The doctrine of election does not operate to bar the plaintiff's claims, as the causes of action are distinct and independent, and the plaintiff could not have made an informed election without knowledge of the fraud at the relevant time.

Whether The Existence Of A Quistclose Trust And Related Tracing Claims Are Suitable For Summary Determination

[46] The second defendant submits that the matters pleaded by the plaintiff could not give rise to a *Quistclose* Trust at law. Central to this contention is the argument that there was no segregation of the loan funds from Aries' general assets, which the second defendant maintains is a fundamental requirement for establishing a *Quistclose* Trust. The second defendant further argues that once the loan funds were comingled with Aries' other funds, any trust that may have existed would be destroyed, making it impossible for the plaintiff to trace or establish ownership over any specific funds. In support of this position, the second defendant points to the fact that the plaintiff is seeking to trace RM564,991,617.25 when the total loan disbursed was only RM400,000,000 and Aries' total revenue during the relevant period was RM644,580,829.

[47] The plaintiff, conversely, maintains that the lack of segregation of funds is not fatal to establishing a *Quistclose* Trust. The plaintiff argues that segregation is merely one indicator to consider in determining whether a *Quistclose* Trust exists, rather than an absolute requirement. The plaintiff relies on the Court of Appeal's decision in *Jagdis Singh Banta Singh v. Zakaria Yahaya & Anor* [2018] CLJU 1151; [2018] 1 LNS 1151; [2019] 1 MLJ 74, which held that a *Quistclose* Trust arises when assets are given to a person for a specific purpose, and in the event such purpose fails, the asset reverts to the transferor. The plaintiff contends that the existence of mutual intention to create the trust is a question of fact that must be determined at trial.

[48] Having considered these submissions, I find that the questions concerning the existence of a *Quistclose* Trust and related tracing claims are not suitable for determination under O. 33 of the Rules of Court 2012. There are several reasons for this conclusion.

[49] A *Quistclose* Trust, which got its name from the case of *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 decided by the House of Lords, is a form of trust that arises when money is lent for a specific purpose, creating a relationship where the borrower must use the funds only for that stated purpose. If the specified purpose fails or cannot be carried out, the money must be returned to the lender, and in the event of the borrower's insolvency, the funds are protected from other creditors as they are held on trust. This arrangement effectively creates a hybrid between a loan and a trust, providing security for lenders by ensuring their money either gets used for its intended purpose or is returned to them, rather than becoming part of the borrower's general assets available to creditors.

[50] Firstly, the existence of a *Quistclose* Trust fundamentally depends on the parties' mutual intention, which requires examination of their relationships and conduct. The evidence before me shows that the loan was

disbursed by the plaintiff to Aries in two tranches of RM200,000,000 each on 2 July 2012 and 15 November 2013 respectively. Whether these funds were advanced with the requisite intention to create a trust relationship is a matter that requires detailed examination of evidence at trial.

[51] Secondly, while the second defendant emphasises the significance of fund segregation, I note that in the UK Court of Appeal case of *R v. Clowes & Anor (No 2)* [1994] 2 All ER 316, the court viewed that segregation of assets is not a necessary element to establish a *Quistclose* Trust. The Court of Appeal stated:

> As to segregation of funds, the effect of the authorities seems to be that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust, and that the absence of such a requirement, if there are no other indicators of a trust, normally negatives it. The fact that a transaction contemplates the mingling of funds is, therefore, not necessarily fatal to a trust.

[52] Therefore, the fact that a transaction contemplates the mingling of funds is not necessarily fatal to a trust.

[53] Thirdly, the tracing claims raised by the plaintiff involve complex factual issues regarding the flow of funds through various accounts and entities. The plaintiff's attempt to trace RM564,991,617.25 against the second defendant requires careful examination of documentary evidence and potentially witness testimony to establish the path of these funds.

[54] In these circumstances, I find that determining these issues summarily under O. 33 would not result in substantial savings of time and costs. Rather, it would risk fragmenting the trial and potentially leading to duplicate proceedings if appeals were to arise from preliminary determinations. These matters are more appropriately resolved at a full trial where all relevant evidence can be properly tested and examined.

Conclusion

[55] In conclusion, while the second defendant has raised several significant legal issues, I am not satisfied that these questions are suitable for determination under O. 33 of the Rules of Court 2012. The jurisdiction of this court to hear civil claims based on bribery is clear and well-established. The doctrine of election does not operate to bar the plaintiff's claims given the distinct and independent causes of action in this suit and Suit 313, particularly considering the timing of the plaintiff's discovery of the alleged fraud. Furthermore, the existence of a *Quistclose* Trust and related tracing claims involve complex questions of fact regarding parties' intentions, relationships, and the movement of funds that cannot be properly resolved without a full trial. The fundamental requirement of O. 33 applications – that they should result in substantial savings of time and costs – has not been met.

A Instead, determining these issues summarily would risk fragmenting the proceedings and potentially causing greater delay and expense. Taking all these factors into consideration, I find that these matters require full ventilation of evidence at trial, where witnesses can be examined and documentary evidence properly scrutinised. Accordingly, the second
B defendant's application is dismissed with costs.

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